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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 393

CLEVELAND BOARD OF EDUCATION,
Petitioner,

vs.

MASHETER, HIGHWAY DIRECTOR, STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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TABLE OF CONTENTS.

Citations to Opinions Below ---------- 1

Jurisdiction ---------- 2

Question Presented ---------- 2

Constitutional and Statutory Provisions Involved --- 2

Statement of the Case ---------- 3

Reasons for Granting Writ ---------- 5

I. The denial of just compensation to a board of education by denying a substitute value in an eminent domain proceeding constitutes a denial of the constitutional mandate of just compensation, due process and equal protection of the laws and is in violation of the XIV and V Amendments to the United States Constitution ---------- 5

Conclusion ---------- 8

Appendix:

Journal Entry of Probate Court ---------- 9

Journal Entry in the Court of Appeals ---------- 12

Opinion of the Ohio Supreme Court ---------- 13

Judgment of the Supreme Court of Ohio ---------- 22

Order of the Supreme Court Denying Rehearing - 22

Relevant Statutes ---------- 22

TABLE OF AUTHORITIES.

Cases.

Appropriation for Highway Purposes of Lands of Gunn Realty, In Re, 14 Ohio App. 2d 165; 237 N.E. 2d 408 (1968) ---- 7

Appropriation of Easement for Highway Purposes of Property of Bertsch, In Re, 118 Ohio App. 285, 194 N.E. 2d 151 (1963) ---- 7

Chicago B&Q R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 ---- 5

Clarksville, Town of, v. United States, 198 F. 2d 238 (4 Cir. 1952), *cert. denied,* 344 U.S. 927 (1953) ---- 6

Cook, County of, v. The City of Chicago, 84 Ill. App. 2d 301; 228 N.E. 2d 183 (1967) ---- 6

Dohany v. Rogers, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904 ---- 5

E & F Construction Company v. Ives, 242 Atl. 2d 768 (1968) ---- 5

Fleming v. Noble, 118 O. App. 289, 171 N.E. 2d 739 (1959) ---- 7

Fort Worth, City of, v. United States, 188 F. 2d 217 (5 Cir. 1951) ---- 6

Jefferson County v. T.V.A., 146 F. 2d 564 (6 Cir.), *cert. denied,* 324 U.S. 871 (1945) ---- 6

Mayor and City Council of Baltimore v. United States, 147 F. 2d 786 (4 Cir. 1945) ---- 6

Melloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed. 2d 653 (1964) ---- 5

Simms v. Dillon, 119 W. Va. 284, 193 S.E. 331 (1937) 5

State ex rel. The Steubenville Ice Company v. Merrell, 127 Ohio St. 453, 189 N.E. 116 (1934) ---- 7

Texas, City of, v. Waco Independent School District, et al., 364 S.W. 2d 263 (1963) ---- 6

United States v. Arkansas, 164 F. 2d 943 (8 Cir. 1947) ---- 6

United States v. Board of Education, 253 F. 2d 760 (4 Cir. 1968) ---- 6

United States v. Certain Land in the Borough of Brooklyn, 346 F. 2d 690 (2 Cir. 1965) ---- 6

United States v. Certain Land in City of Red Bluff, 192 F. Supp. 725 (N.D. Cal. 1961) ---- 6

United States v. Des Moines County, 148 F. 2d 448 (8 Cir.), *cert. denied*, 326 U.S. 743 (1945) ---- 6

Washington v. United States, 214 F. 2d 33 (9 Cir.) *cert. denied*, 348 U.S. 862 (1954) ---- 6

Wichita, City of, v. Unified School District #359, 439 Pacific 2d 162 (1968) ---- 5

Constitution.

Constitution of the United States:

Amendment V ---- 2, 5

Amendment XIV ---- 2, 5

Statutes.

Ohio Revised Code:

Sec. 3313.48 ---- 3, 28

Sec. 4931.08 ---- 3, 29

Sec. 5501.18 ---- 3, 28

Sec. 5519.01 ---- 3, 22

Sec. 5519.02 ---- 3, 24

Sec. 5519.03 ---- 3, 26

Sec. 5537.06 ---- 3, 29

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. _____.

CLEVELAND BOARD OF EDUCATION,

Petitioner,

vs.

MASHETER, HIGHWAY DIRECTOR, STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this cause on the 19th day of February, 1969, reversing the Court of Appeals for the Eighth Judicial District of Ohio, Cuyahoga County, and the Probate Court of Cuyahoga County, and the further order of the Supreme Court of Ohio entered in this cause on March 19, 1969, denying petitioner's Motion for Rehearing.

CITATIONS TO OPINIONS BELOW.

The Supreme Court of Ohio's decision reversing the lower Court is found at 17 Ohio St. 2d 27, 244 N.E. 2d 745 and 46 Ohio Opns. 2d 197 (1969). The Court of Appeals affirmed without opinion in the Journal Entry, printed in the Appendix *infra,* page 12. No opinion was rendered by the Probate Court but the Journal Entry is likewise printed in the Appendix, *infra,* page 9.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on the 19th day of February, 1969 and petitioner's timely Motion for Rehearing was denied on March 19, 1969. The jurisdiction of this Court is invoked under 28 USC Section 1257 (3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTION PRESENTED.

I. Does the denial of just compensation to a board of education, by denying it substitute value of land and buildings taken in an eminent domain proceeding, constitute a denial of the constitutional mandate of just compensation, due process and equal protection of the laws in violation of the XIV and V Amendments of the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States.

Amendment XIV, Section 1, Clause 2:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Amendment V:

"* * * nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Statutes.

Sections 5537.06 and 4931.08 as well as 5519.01, .02 and .03 and Section 3313.48 and Section 5501.18 of the Ohio Revised Code are reprinted in the Appendix, *infra*, pp. 22-29.

STATEMENT OF THE CASE.

The Director of Highways of the State of Ohio instituted this proceeding to appropriate the entire Buhrer School, some 52,000 square feet of one, two and three story buildings and also the playground facilities, and in addition, 11,680 square feet of real estate out of a total surface area of 64,600 square feet. Buhrer School facilities had a physical capacity to educate and house up to 700 pupils. Buhrer Elementary School was a public school owned by the Cleveland Board of Education and located on the west side of Cleveland and surrounded by other elementary school districts.

On November 30, 1965, the Director filed, in the Probate Court of Cuyahoga County, Ohio, a resolution and finding pursuant to statute and on December 30, 1965 the Board of Education of the School District of the City of Cleveland filed its petition showing its intent to appeal the amount of compensation found by the Director. The case was then set down for trial for a jury to determine just compensation on the 25th day of February, 1966. The jury verdict was in the amount of $788,400.00. The verdict was well within the evidence placed before the jury.

The Board of Education proceeded with its evidence on the basis of its constitutional right to just compensation and submitted evidence as to the cost of a substitute facility, since a new school legally and factually had to immediately be built to replace the old Buhrer School.

The school facilities were demolished by the Director of Highways shortly after the trial and new school facilities have just been opened within the past several months.

The Director of Highways was permitted to introduce evidence of the "fair market value" which did not take into account the cost of a substitute facility and used market value conceptions of appraising when there was factually no market for the sale of public schools.

After the jury verdict and judgment thereon, the Director of Highways appealed to the Court of Appeals which Court affirmed the lower court without opinion. The Director of Highways then appealed to the Ohio Supreme Court which allowed a Motion to Certify and took jurisdiction to hear the case on its merits. It thereafter rendered its opinion and judgment reversing the two lower courts thereby finding that the Board of Education was not entitled to substitute value as just compensation for its property taken in this condemnation proceeding.

It is from that opinion and judgment that Petitioner brings its petition for a Writ of Certiorari since substitution value has been almost universally adopted by state and federal courts as a true measure of compensation in appropriation of schools and of municipal property.

REASONS FOR GRANTING WRIT.

I. The denial of just compensation to a board of education by denying a substitute value in an eminent domain proceeding constitutes a denial of the constitutional mandate of just compensation, due process and equal protection of the laws and is in violation of the XIV and V Amendments to the United States Constitution.

The Board of Education, Petitioner herein and Appellee below, requests the granting of this Writ because of the substantial injury to its property rights and to its constitutional rights. The injury is a result of the Ohio Supreme Court's denial of just compensation and substitution value for the appropriation of the facilities of Buhrer Elementary Public School.

The United States Supreme Court has held that the just compensation clause of the Fifth Amendment is incorporated into the due process of law clause of the Fourteenth Amendment. *Melloy v. Hogan,* 378 U.S. 1 at page 4, 84 S. Ct. 1489, 12 L.Ed. 2d 653 (1964); *Chicago B&Q R.Co. v. Chicago,* 166 U.S. 226, 17 S. Ct. 581, 41 L.Ed. 979; *Dohany v. Rogers,* 281 U.S. 362, 50 S. Ct. 299, 74 L.Ed. 904. State Courts have also recognized this Federal holding. *Simms v. Dillon,* 119 W. Va. 284, 193 S.E. 331 (1937); *E & F Construction Company v. Ives,* 242 Atl. 2d 768 (1968). The decision of the Ohio Supreme Court denies the requirement of just compensation to the Board of Education.

It has been the rule in the Federal Courts and in the State Courts, which have considered the question, that schools are entitled to the cost of replacement or the substitution value when school property has been taken, for them to receive just compensation. *City of Wichita v. Unified School District* #359, 439 Pacific 2d 162 (1968);

City of Texas v. Waco Independent School District, et al., 364 S.W. 2d 263 (1963), Court of Appeals; *County of Cook v. The City of Chicago*, 84 Ill. App. 2d 301; 228 N.E. 2d 183 (1967); *United States v. Certain Land In The Borough of Brooklyn*, 346 F. 2d 690 (2 Cir. 1965); *United States v. Board of Education*, 253 F. 2d 760 (4 Cir. 1968).

Nothing less than the cost of a substitute has been held to satisfy the constitutional mandate of just compensation. Schools cannot wind-up their affairs after school property has been taken as private parties can because by law and, in fact, it is absolutely essential that new school facilities be built to replace those taken so that the education of children may continue. It is totally different than when a private business or residence is taken, because they do not have to immediately rebuild a new facility to replace the one appropriated. Because of this unique urgency, the substitute facilities doctrine has been developed to meet the unique needs of public condemnees. *United States v. Certain Land In Borough of Brooklyn*, 346 F. 2d 690 (2 Cir. 1965) (playground); *United States v. Board of Education*, 253 F. 2d 760 (4 Cir. 1968) (school grounds); *Washington v. United States*, 214 F. 2d 33 (9 Cir.), *cert. denied*, 348 U.S. 862 (1954) (highway); *Town of Clarksville v. United States*, 198 F. 2d 238 (4 Cir. 1952), *cert. denied*, 344 U.S. 927 (1953) (sewer system); *City of Fort Worth v. United States*, 188 F. 2d 217 (5 Cir. 1951) (streets); *United States v. Arkansas*, 164 F. 2d 943 (8 Cir. 1947) (highway); *United States v. Des Moines County*, 148 F. 2d 448 (8 Cir.), *cert. denied*, 326 U.S. 743 (1945) (roads); *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786 (4 Cir. 1945) (streets and alleys); *Jefferson County v. T.V.A.*, 146 F. 2d 564 (6 Cir.), *cert. denied*, 324 U.S. 871 (1945) (highway); *United States v. Certain Land in City of Red Bluff*, 192 F. Supp. 725 (N.D. Cal. 1961) (parking lot).

The above Federal cases show that substitute facilities is the requirement of just compensation under the Fifth Amendment.

The Fifth Amendment requirement of just compensation have been held by the courts of Ohio to apply in Ohio. *State ex rel. The Steubenville Ice Company v. Merrell,* 127 Ohio St. 453, 189 N.E. 116 (1934); *In Re Appropriation of Easement for Highway Purposes of Property of Bertsch,* 118 Ohio App. 285, 194 N.E. 2d 151 (1963); *Fleming v. Noble,* 118 O. App. 289, 171 N.E. 2d 739 (1959); *In Re Appropriation for Highway Purposes of Lands of Gunn Realty,* 14 Ohio App. 2d 165; 237 N.E. 2d 408 (1968).

The Ohio Courts have repeatedly held then, that any owner is entitled to just compensation. Just compensation under all the above school and municipal cases requires the payment by an appropriator of the cost of replacing the facilities taken. But for schools, the Ohio Supreme Court has held that they are not entitled to just compensation, i.e. the cost of a substitute facility. Its opinion holds that the old formulas of market value are to apply including depreciation. This holding can result in the Board of Education, petitioner herein, receiving ⅕th of the jury award rendering just compensation, and thus places an enormous financial burden upon the Board of Education. The cost of the new substitute Buhrer School is and was over one million dollars. It has recently been completed. This is what the Board had to expend to replace Buhrer school. The testimony of the witnesses of the Highway Director under the old conventional formulas was approximately $155,000 to $175,000. The taxpayers in the school district should not be required to make up this enormous difference. The decision of the Ohio Supreme Court herein permits and requires such testimony to the exclusion of substitute value. This is a clear denial of just

compensation which all the above courts have held requires the cost of a substitute facility for the public condemnee.

CONCLUSION.

The decision of the Ohio Supreme Court permits economic disaster to fall upon schools when school property is appropriated by the Director of Highways. Instead of just compensation to put the Board of Education in the same position after as before the appropriation, the Board can receive a mere pittance and is forced to expend over a million dollars. Rising building costs make an unjust situation even worse. The Board here can recover only one-ninth of its actual cost.

The erroneous decision of the Ohio Supreme Court has great and widespread application for schools throughout the country and can greatly prejudice and injure them in appropriation proceedings. This Court has an opportunity to rectify the holding of the Ohio Supreme Court.

Therefore, this Court is requested to grant this writ of certiorari to the Ohio Supreme Court and to reverse its erroneous decision, thereby insuring to schools and the Board of Education herein the just compensation to which they are entitled. For these and all the foregoing reasons, petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

CLARENCE L. JAMES, JR.,
Director of Law,

DONALD J. GUITTAR,
Assistant Director of Law,
Counsel for Petitioner
Board of Education.

APPENDIX.

JOURNAL ENTRY OF PROBATE COURT.

(July 5, 1966 signed and filed.)

This cause came on duly to be heard for the determination of compensation of land and building taken and assessment of damages to the residue. Thereupon, a jury was duly impanelled and sworn; and such issues as to compensation and damages were duly submitted to said jury. Thereupon, after due deliberation, said jury returned a total verdict of Seven Hundred Eighty-eight Thousand Four Hundred Dollars and No Cents ($788,400.00), as compensation for the land taken, as compensation for the structure taken, and as damages to the residue including limitation of access there being no provision in the verdict form for a breakdown of these components of the total verdict.

It is therefore ordered, adjudged and decreed that the said proceedings be and the same are hereby approved and confirmed by the Court and that the Director of Highways of the State of Ohio shall deposit with this Court, a sum sufficient, to-wit: Six Hundred Fifteen Thousand Nine Hundred Dollars and No Cents ($615,900.00), which when added to the original deposit herein, to-wit: One Hundred Seventy-two Thousand Five Hundred Dollars and No Cents ($172,500.), will equal the said sum of Seven Hundred Eighty-eight Thousand Four Hundred Dollars and No Cents ($788,400.00), which shall be held by the Clerk pending further order of the Court as to an order for distribution made by the Court.

Further, in conformity with these proceedings, it is ordered, adjudged and decreed that the fee simple title and easement for highway purposes in, over and upon the premises described in the resolution and finding as Parcel

No. 3374-WL (HIGHWAY) limited access and Parcel No. 3374-T-1 (TEMPORARY) the same being located in the City of Cleveland, Cuyahoga County, Ohio, lying on the left side of the centerline of a survey made by the Department of Highways, and recorded in the records of Cuyahoga County, Ohio, and being more fully described as follows:

PARCEL NO. 3374-WL (HIGHWAY).

ALL RIGHT, TITLE AND INTEREST IN FEE SIMPLE IN THE FOLLOWING DESCRIBED PROPERTY, INCLUDING THE STRUCTURE THEREON:

Beginning at the southeasterly property corner which is a point on the northerly line of Buhrer Avenue, S.W., said point being 135.04 feet left of Station 946 plus 98.80 on the baseline of southbound Interstate 71; thence westerly along the northerly line of Buhrer Avenue 53.46 feet to a point; thence northwesterly along the proposed limited access and right of way a distance of 319.76 feet to a point on the southerly line of Rowley Avenue; thence easterly along the southerly line of Rowley Avenue a distance of 20.00 feet to the northeasterly property corner, said point being 154.39 feet left of Station 950 plus 24.74 on the baseline of southbound Interstate 71; thence southerly along the easterly property line a distance of 318.00 feet to the place of beginning; containing 11,680 square feet of land more or less.

Together with all rights or easements of access to or from said limited access highway, from or to the land of said persons abutting upon that portion of said limited access highway, as shown by the plans of said improvement herein referred to.

Said stations being the Station numbers as stipulated in the hereinbefore mentioned survey.

Owner claims title by instruments recorded in Volume 3569, page 496, Volume 4931, page 439 and Volume 4934, page 463, Deed Records of Cuyahoga County, Ohio.

PARCEL NO. 3374-T-1 (TEMPORARY).

TEMPORARY RIGHT TO ENTER UPON THE FOLLOWING DESCRIBED LAND TO REMOVE THE STRUCTURE THEREFROM, IN ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ON FILE IN THE DEPARTMENT OF HIGHWAYS, COLUMBUS, OHIO.

Beginning at the southeasterly property corner, which is a point on the northerly line of Burher Avenue, said point being 135.04 feet left of Station 946 plus 98.80 on the baseline of southbound Interstate 71; thence westerly along the northerly line of Buhrer Avenue, 53.46 feet to the principal place of beginning; thence continuing westerly along the northerly line of Buhrer Avenue a distance of 173.62 feet to a point, said point being the southwesterly property corner; thence northerly along the westerly property line a distance of 130.00 feet to a point; thence North 88 degrees 14 minutes 15 seconds East in distance of 95.00 feet to a point; thence North 1 degree 45 minutes 45 seconds West a distance of 90.00 feet to a point; thence North 88 degrees 14 minutes 15 seconds East a distance of 101.77 feet to a point on the proposed limited access and right of way line; thence southwesterly along the proposed limited access and right of way line a distance of 221.21 feet to the principal place of beginning, containing 32,193 square feet of land more or less.

be and the same hereby are duly vested in the State of Ohio, free and clear of all claims of the owners of said lands and persons having an interest therein, to-wit:

Name	*Place of Residence*
The Board of Education of the City School District of the City of Cleveland John J. Gallagher, President	10328 Clifton Boulevard Cleveland, Ohio

When the Director of Highways of the State of Ohio completes demolition of structures on premises, the tem-

porary easement shall be terminated and all rights of the Board of Education of the City School District of the City of Cleveland to the property included in the description of the temporary easement shall be restored to the Board of Education free and clear of any interest therein in the Director of Highways of the State of Ohio.

It is further ordered that the Director of Highways of the State of Ohio pay all court costs herein accrued and that a record be made of these proceedings according to law.

Record is hereby ordered.

Exceptions noted to Director of Highways of the State of Ohio, exceptions noted to the Board of Education of the City School District of the City of Cleveland.

JOURNAL ENTRY IN THE COURT OF APPEALS.

(December 4, 1967.)

This cause came on to be heard on the plaintiff-appellant's appeal on questions of law from the jury verdict and judgment of the Probate Court, Cuyahoga County, and was heard on the pleadings, bill of exceptions and was argued by counsel for the parties and upon consideration whereof the Court finds there is no error apparent on the record in such proceedings and judgment prejudicial to the appellant and the judgment is therefore affirmed.

And the court finding there was reasonable ground for this appeal, allows no penalty but that pursuant to RC 2335.23 the Clerk of this court shall certify in the mandate to the Probate Court for execution costs assessed herein against the appellants.

And the Court being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

It is further ordered that the appellant pay the costs of this proceeding.

It is further ordered that a special mandate be sent to the Probate Court of Cuyahoga County, Ohio, for execution upon this judgment.

To all of which appellant, by his counsel, excepts.

OPINION OF THE OHIO SUPREME COURT.

(17 Ohio St. 2d 27 (1969).)

Appropriation of property for highway purposes—School buildings and school grounds—Measure of compensation—Charge to jury—Value of property taken for any suitable uses.

1. In a proceeding for appropriation of school property by the Director of Highways, it is error for the court to instruct the jury that the measure of compensation is the replacement value or the cost of providing a substitute equivalent facility.

2. In such a proceeding, the question to be determined is the value of the property taken for any and all uses for which it may be suitable, including the most valuable uses to which it can lawfully, reasonably and practically be adapted.

(No. 68-13—Decided February 19, 1969.)

APPEAL from the Court of Appeals for Cuyahoga County.

This proceeding was instituted in the Probate Court of Cuyahoga County by the Director of Highways, appel-

lant herein, to appropriate for highway purposes the Buhrer public school and school grounds located in the city of Cleveland. The Board of Education of the city of Cleveland, appellee herein, following statutory procedure, filed a petition setting forth an intention to appeal from the amount of compensation fixed by the director.

The property appropriated consists of elementary public school buildings and school grounds. The buildings consist of three sections, one of which was built in the year 1883, one in 1897, and one, a 3,500 square-foot gymnasium, in 1939. The buildings are sufficient in size to accommodate 700 students, and at the time its use as a school was terminated it was serving 574 students. It had been maintained to meet safety and health requirements.

An expert witness for the board of education testified that the cost of acquiring necessary additional land would be $225,078, that the cost for a replacement building to accommodate 700 to 800 students would be $900,000 and that the total cost would be $1,125,078.

Witnesses for the Director of Highways testified to the fair market value for the land taken, damages to the residue and temporary easement of $165,801 and $159,001, respectively. A third witness, Karl F. Kaserman, an appraiser employed by the board of education, was called by the Director of Highways. His testimony of a fair market value of $195,330 was proffered. The court rejected this appraisal on the ground that his testimony as to value was privileged.

The court's instructions to the jury are claimed to be contrary to the law of Ohio.

The jury returned a verdict of $788,400 on a verdict form containing no provision for separate damages for land and buildings, and judgment was entered thereon. The Court of Appeals affirmed the judgment of the Pro-

bate Court, without opinion. The cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. William B. Saxbe, attorney general, and *Mr. I. Charles Rhoads*, for appellant.

Mr. Clarence L. James, Jr., director of law, and *Mr. Donald J. Guittar*, for appellee.

DOYLE, J. The errors assigned by the Director of Highways relate to:

1. The standard of substitution or replacement value as the measure of compensation;

2. Extension of privilege to appraiser employed by adverse party;

3. The exclusion of conflicting prior statements of a witness on the ground that they occurred during a period of negotiation;

4. The admission of opinion evidence of replacement costs by the board of education expert in the absence of any specific plans for a replacement school;

5. The use of a single damage item verdict form, whereas Section 5519.03, Revised Code, requires separate findings of value for land and for buildings.

The charge of the court, directly attacked by the appellant as being an illegal method of computing damages in cases of this character, is in essential part as follows:

> "Ordinarily, in this state of Ohio, the standard of measurement for valuation of private properties taken for a public purpose would be the fair market value of that property taken. Fair market value has been defined as the price a willing buyer would pay a willing seller, neither being under any compulsion or duress to sell or to buy. However, such a standard of

measurement of compensation is not applicable in this case.

"Here, where there is a taking of a public facility, a school, by another public body, the state, the measure of compensation may be made by the payment of the cost of a substitute, so long as a full equivalent is afforded for the property taken. This award however must not be in excess of strict equivalence.

"The equivalence requirement which must be met with respect to the substitute facility for school facilities taken by eminent domain is more than that of mere monetary value, and the substitute facility must be such that the school board is legally required to construct and maintain, even if this type is more expensive and more efficient than the facility which was condemned.

"In other words, where no market value exists for a school, as is the case here, and the highest and best use of the property is for school purposes, the replacement value of the property taken is a proper element for your consideration.

"The reasoning for measuring the amount of compensation to be paid for a school facility in a different manner than the compensation to be paid for the taking of a private property is twofold:

"First, the fair market value of the school property, that is its replacement cost less depreciation, is not a true measure of its value to the school board or to the community;

"Second, where two public bodies are properly and satisfactorily carrying out their responsibilities, and one of these bodies is rendered unable to continue to carry out its responsibility by the acts of another, it is the duty of the public body incapacitating the other to restore the injured public body to the same station and status it enjoyed prior to the intrusion of its function.

"That is why the measure of compensation to be paid the Cleveland City School District for the taking of the Buhrer School property is the replacement cost

or the cost of an equivalent substitute, and it is your duty to determine that compensation from the evidence that has been presented herein.

"In determining this compensation to be paid, you may consider the location of the school, the number of classrooms, the pupils served by the school, the highest and best use of the property, [and] the need for a school in this area.

"All of this must be considered in the light of the evidence which you have received. The court charges you to consider all of the facts and circumstances which you find have been shown by the evidence to bear upon the replacement cost or the cost of a substitute facility."

In addition to this general charge, the jury, upon the request of the Board of Education, was given the following special instructions:

1. "The eminent domain taking of school facilities may be justly compensated by payment of cost of a substitute so long as a full equivalent is afforded for the property taken, but the award must not be in excess of strict equivalence."

2. "The equivalence requirement which must be met with respect to substitute facility for school facilities taken by eminent domain is more that of utility than of mere monetary value, and the substitute facility must be that which the school board is legally required to construct and maintain, whether this type be more expensive or efficient than the facility which was condemned."

No problem is presented as to the authority of the Director of Highways to appropriate for highway purposes the school property involved. That authority is contained in Section 5519.01, Revised Code.

The first question for decision is, what is the measure of compensation to be awarded the owner? Did the court

err in its directions to the jury in respect to determination of the true value in money for the property taken? The owner, although a public body, stands in law in the same position as a private person.

It is the claim of the board of education that "the law of just compensation requires the cost of a substitute as the basis for making a board of education whole," and that the necessary elements under which the doctrine may be invoked (all of which, it is asserted, have been established in the trial) are:

1. The board of education must be under legal obligation to educate children with educational facilities.

2. The substitute or replacement facility must factually be necessary.

3. There is no "fair market value," that is there are no comparable sales, nor is the property involved income producing, so that in law and fact, there is no market value for the facility or school.

4. The substitute facility must not be in excess of strict equivalence of the facility taken but must be the full equivalence of its replacement, that is the equivalence is more that of utility than dollars and cents value.

The Department of Highways objects to using the cost-of-substitution measure of damages, mostly for the reason that the depreciation of the condemned facilities is not made an important factor and that just compensation does not contemplate exchanging new public school facilities for old ones.

When the many reported cases throughout the nation are reviewed, the conclusion must be drawn that just compensation for a taking of property already devoted to public use does not mean the same in all jurisdictions. There are authorities which hold for substitution value rather

than market value. See *United States v. Certain Land in Brooklyn*, 346 F. 2d 690; *Clarksville v. United States*, 198 F. 2d 238; *United States v. Certain Land in Red Bluff*, 192 F. Supp. 725; *Wichita v. Unified School District*, 201 Kan. 110, 439 P. 2d 162; *County of Cook v. Chicago*, 84 Ill. App. 301, 228 N.E. 2d 183; *State v. Waco Independent School District* (Tex. Civ. App.), 364 S.W. 263. These cases, apply the substitution-value standard on the theory that there is a distinction between a public facility and private property; that a public facility produces no income; that it is not the kind of property sold generally; and that, as a consequence, income and comparable sales approaches, used in determining market value, are useless. The theory is that there is no market value for such facilities and no market value can be determined.

Other cases adopt the theory of a market value for such properties. While the absence of a market for a public facility may render appraisal more difficult, nevertheless it may be reasonably valued on a cost-approach basis, a recognized appraisal technique. Such cost approach would be the replacement cost of the old buildings taken, less observed physical depreciation. Obsolescence is also a recognized component of depreciation in the real estate appraisers' lexicon.

There is no precedent directly in point in this state controlling the method of determining just compensation for the appropriation of public school buildings. The latest Ohio case involving the appropriation of a special-purpose property (a children's home) is *Board of County Commrs. v. Thormyer*, 169 Ohio St. 291. It appears from that case that the market-value theory was recognized. In the case before us, we find no justification for departing from the market-value measure and from assuming a willing purchaser, which purchaser would bid as though, in fact,

there were an active market. This market value could be determined by the application of old principles to new conditions.

The method of computing compensation for the land and buildings taken may be measured in money upon the basis of its maximum value for any purpose for which its use is suitable, including the use which is presently made of it. The land value in the instant case should not present a serious problem, for the reason that sale prices of similar parcels can be compared. The buildings, however, present a more difficult problem. Two of the buildings are 71 and 85 years old respectively. The gymnasium is 29 years old. In the evidence are various representations of the future life of the buildings. If it is assumed that the usual expected economic life of such structures is 100 years, it is obvious that the present structures have considerably less than that expected life. It is not proper to compute the true value in money on the basis of present costs of new structures with long economic lives, when each of the structures under consideration has a much shorter economic life. True value in money may be computed by taking a depreciation factor from a replacement cost estimate.

The replacement cost of the present facility, together with an analysis of its depreciation, is a more reliable method of arriving at true value, and, to the extent that the charge of the court discarded this approach to true value, it was prejudicial to appellant, the Director of Highways.

There are specific statutes in this state requiring relocation or duplication of property or facilities taken through the procedure of eminent domain. See Sections 5537.06 and 4931.08, Revised Code. These statutes, however, do not relate to the acquiring of public school property by the

Department of Highways, and may not be applied to such an appropriation.

Directing attention now to the remaining assignments of error, we find error in the court's exclusion of the testimony of an expert witness who had been employed by the property owner, and error in the exclusion of conflicting prior statements of a witness on the ground that they occurred during a period of negotiation. The fourth assignment of error relates to the cost of a replacement school. In view of the position taken as to the first assignment of error, this question need not be ruled upon. The fifth assignment of error relates to "a single damage item verdict." Section 5519.03, Revised Code, requires the jury in a case of this kind to make a separate finding of value for the land and for the structure. The single finding verdict form used in this case was probably used because of the single-value theory of damages employed by the court. This problem will not occur upon a retrial of the cause on the market-value theory of damages. The statutory requirement is persuasive, however, of a legislative intent that property value, rather than facility replacement, is the proper standard of measurement of compensation for cases of this kind.

The judgment is reversed and the cause is remanded for a new trial.

Judgment reversed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL and SCHNEIDER, JJ., concur.

HERBERT and DUNCAN, JJ., not participating.

DOYLE, J., of the Ninth Appellate District, sitting by appointment.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(Entered Feb. 19, 1969.)

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for reasons stated in the opinion filed herein; and the cause is hereby remanded to the Probate Court for a new trial. Appellee to pay costs. Mandate to issue.

ORDER OF THE SUPREME COURT DENYING REHEARING.

(Entered March 19, 1969.)

It is ordered by the court that the rehearing in this case is denied.

RELEVANT STATUTES.

Section 5519.01, Ohio Revised Code.

If the director of highways is unable to purchase property for any purpose authorized by Chapters 5501., 5503., 5505., 5511., 5513., 5515., 5517., 5519., 5521., 5523., 5525., 5527., 5529., 5531., and 5533. of the Revised Code, he shall first enter on the journal of the department of highways a finding that it is necessary, for the public convenience and welfare, to appropriate such property as he deems needed for such purposes. Such finding shall contain a definite, accurate, and detailed description of the property, and the name and place of residence, if known or with reasonable diligence ascertainable, of the owner of the property appropriated.

The director shall, in such finding, fix what he deems the value of such property appropriated, together with

damages to the residue and deposit the value thereof, together with such damages with the probate court or the court of common pleas of the county within which such property, or a part thereof, is situated, for the use and benefit of such owner, and thereupon the director may take possession of and enter upon said property, including the buildings and structures thereon, for any such purposes. At the time of making such deposit the director shall also file with such court a true copy of the resolution or finding together with a precipe and sufficient additional copies of the resolution or finding for service of such resolution or finding, also a form of printer's notice, if required for service by publication, and a plat of the property appropriated, which copy and plat shall be recorded with said court.

The clerk of such court shall within three days issue notice, in general form and manner of a summons, to such owner of the amount of money deposited with the court on account of the property appropriated, which notice shall contain, or have attached, a definite, accurate, and detailed description of the property appropriated, as shown by or contained in the copy of the resolution or finding filed with the court by the director, and shall also be accompanied by a plat of the property appropriated. Upon application of such owner the court shall turn over to him the amount of money so deposited. Notice shall be served upon such owner and return made within three days and the costs thereof shall be paid as in other civil actions. There shall be indorsed on the face or back thereof the final date on which a petition setting forth an intention to appeal may be filed as provided in section 5519.02 of the Revised Code. In case the owner is a nonresident of the state or cannot be found the clerk shall give notice by publication by one insertion in some newspaper published in and of

general circulation in the county, or if there is no such newspaper published in the county then in some newspaper of general circulation in the county.

Section 5519.02, Ohio Revised Code.

If any owner of property appropriated by the director of highways is not satisfied with the amount of money as fixed by the director, such owner may, within thirty days after the service of said notice, or within forty days after the date of publication, if service is made by publication, file a written petition, in duplicate, in the court, setting forth an intention to appeal from the amount so fixed. The petition shall contain a description of the property appropriated and a prayer that the amount due the appellant be determined.

The court shall fix the amount of bond to be given by the appellant, which shall be reasonable, and cause an entry thereof to be made on the journal of the court, and within threee days transmit by registered or certified mail to the director one copy of said notice of intention to appeal and a copy of said entry.

The appellant, within five days after the fixing of the amount of bond, shall file with the court a bond, in the amount so fixed, with sureties to the approval of the court, and such bond shall be conditioned to pay all costs made on the appeal if the appellant fails to sustain such appeal, or if the same is dismissed. Minors or other persons under disability, or their respective guardians, shall not be required to give bond. The property of such persons shall be liable for all costs adjudged against them or their legal representatives.

Upon bond being filed and approved, or in cases where no bond is required upon notice of intention to appeal being filed, the court shall fix a day, not exceeding

five days thereafter, for the hearing of all preliminary questions and motions and the examination of the papers and proceedings.

On the day fixed all preliminary motions and questions arising upon appeal shall be heard and determined, and if the court finds the proceedings are irregular, or the appeal is not perfected, it shall dismiss it at the cost of the appellant. The court may waive technical defects, errors, or omissions in such proceedings.

If the court finds that such appeal has been properly perfected, and that proceedings are substantially regular, the court shall transmit to the director the money deposited in the court for the use and benefit of the appellant. The court shall fix a day, not more than twenty days after it has determined that appeal has been properly perfected, for the trial of the case by jury. For purposes of the trial the appellants shall be considered as one party and the director as one party. The selection and impaneling of the jury, and the introduction of evidence to the jury shall be done under the direction of the court in accordance with the rules of law and procedure governing civil actions in the court of common pleas. However, it shall be grounds for challenge for cause if a juror has served in two appropriation trials in the same term of court.

If the owners of more than one parcel appeal, the court may, with the consent of the parties, order the cases to be consolidated and tried together, but the rights of each owner as to compensation, or damages, or both, shall be separately determined by the jury in its verdict.

Upon the motion of either party, the jury, under the care of an officer of the court and with such person as the court designates to show them the premises, shall examine the property taken and the property of the several appellants claimed to be damaged thereby. Such examination

shall be before any testimony is submitted, except the plat and a survey of the property taken and the title papers of the appellant, if produced, which the jury may take with them. After making such examination, the jury shall return to the court at the time fixed therefor.

At the conclusion of the trial, the court shall charge the jury and the jury shall find and return a verdict, separately, upon each claim for compensation and damages appealed from and the court shall render a judgment in favor of the appellants for the amount of the verdict returned by the jury in their favor. In case of the filing of a motion for a new trial or an appeal, which appeal shall be in the court of appeals, a bill of exceptions shall be allowed as in other civil cases, but the right of the state to possession of the property shall not be affected by the filing or disposition of a motion for a new trial, or by a review by any court of appellate jurisdiction. The director, if he has not occupied or changed the property appropriated, may, at any time but not later than thirty days after the final determination of the cause, elect to abandon the appropriation proceedings upon the payment of the costs and reasonable attorney fees to be fixed by the court.

The court shall make a record of all proceedings before it and tax the costs, which shall include jury fees, in favor of the prevailing and against the losing party. If there are several appellants in the same action and costs are adjudged against them, the court shall apportion the costs equitably among them.

Section 5519.03, Ohio Revised Code.

When a building or other structure is situated upon land appropriated for any highway improvement, or is situated partly upon the land appropriated therefor and partly upon adjoining land, so that such structure cannot

be divided upon the line between such lands without manifest injury thereto, the jury, in assessing compensation to any owner of the land shall assess the value thereof exclusive of the structure. A separate finding shall be made of the value of the structure. The owner or occupant of such structure shall vacate the same within sixty days after service of notice as required under the provisions of section 5519.01 of the Revised Code, after which time the director may remove said structures. In the event such structures are removed before the jury has fixed the value of the same, the director, before such removal, shall cause an appraisal to be made by three persons, one to be appointed by the owner, one by the county auditor, and one by the director, and such appraisal may be used as evidence by the owner or director in the trial of said case but shall not be binding on said owner, director or the jury, and the expense of said appraisal shall be approved by the court and charged as costs in said case; shall cause pictures to be taken of all sides of said structure; and shall compile a complete description of said structure, which he shall preserve as evidence in said case to which the owner or occupants shall have access. Furthermore, where a building or structure is taken and the owner has appealed from the amount of compensation and damages as fixed by the director, at anytime before the termination of said case, said owner may apply to the court in which said case is pending to withdraw the portion of the deposit representing the sum fixed for said structure and such withdrawal shall in no wise interfere with said case except the sum so withdrawn shall be deducted from the sum of the final verdict. Upon such application being made the court shall direct the clerk of courts to pay said sum to such owner or owners.

Section 3313.48 Ohio Revised Code.

The board of education of each city, exempted village, and local school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof. Every day school so provided shall be open for instruction with pupils in attendance for not less than one hundred seventy-six days in each school year. Each day for grades seven through twelve shall consist of not less than five clock hours with pupils in attendance, except in such emergency situations, including lack of classroom space, as shall be approved by the state board of education. Each day for grades one through six shall consist of not less than five clock hours with pupils in attendance which may include fifteen minute morning and afternoon recess periods, except in such emergency situations, including lack of classroom space, as shall be approved by the state board of education.

Section 5501.18 Ohio Revised Code.

The director of highways shall not be suable, either as a sole defendant or jointly with other defendants, in any court outside Franklin county except in actions brought by a railroad company under section 4957.30 of the Revised Code, or by a property owner to prevent the taking of property without due process of law, in which case suit may be brought in the county where such property is situated, or in any action otherwise specifically provided for in Chapters 5501., 5503., 5505., 5511., 5513., 5515., 5517., 5519., 5521., 5523., 5525., 5527., 5529., 5531., and 5533. of the Revised Code.

Section 5537.06 Ohio Revised Code.

The Ohio turnpike commission may acquire by appropriation any land, rights, rights of way, franchises, easements, or other property necessary or proper for the construction or the efficient operation of any turnpike project. In any proceedings for appropriation under this section, the procedure to be followed shall be in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code.

This section does not authorize the commission to take or disturb property or facilities belonging to any public utility or to a common carrier engaged in interstate commerce, which property or facilities are required for the proper and convenient operation of such public utility or common carrier, unless provision is made for the restoration, relocation, or duplication of such property or facilities elsewhere at the sole cost of the commission.

Section 4931.08 Ohio Revised Code.

When lands authorized to be appropriated to the use of telegraph company are subject to the easement of a street, alley, public way, or other public use, within the limits of a municipal corporation, the mode of use shall be such as is agreed upon between the municipal authorities and the company. If they cannot agree, or if the municipal authorities unreasonably delay entering into an agreement, the probate court of the county shall, in a proceeding instituted for the purpose, direct in what mode the telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of it.

This section does not authorize a municipal corporation to demand or receive compensation for the use of a street, alley, or public way, beyond what is necessary to restore the pavement to its former state of usefulness.

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IN THE

Supreme Court of the United States

No. 393

October Term, 1969

CLEVELAND BOARD OF EDUCATION,
Petitioner,

vs.

MASHETER, ETC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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TABLE OF CONTENTS

Jurisdiction 1

Question Presented 1

Argument in Opposition to the Writ 1

Conclusion 5

TABLE OF AUTHORITIES

Cases

Board of County Commissioners v. Thormyer, Acting Director of Highways, 169 Ohio St. 291 (1959)..... 3

Board of Education of Cincinnati v. Volk, 72 Ohio St. 469 (1905) 2

Chicago, Burlington & Quincy Railroad Company v. City of Chicago, 166 U.S. 226 (1897)..... 6

Cline v. Martin, 94 Ohio St. 420 (1916) 2

Finch v. Board of Education of Toledo, 30 Ohio St. 37, (1876) 1

James P. McGovern v. City of New York, 229 U.S. 363 (1913) 6

Lincoln Township School District v. Redfield Consolidated School District, 226 Iowa 298 (1939)..... 2

Lynch v. New York, 293 U.S. 52 (1935) 5

McCoy v. Union Elevated Railroad Company, 247 U.S. 354 (1918) 6

Sowers, Supt. v. Schaeffer, 155 Ohio St. 454 (1951).... 3

State ex rel. Board of Education of Springfield City School District v. Gibson, 130 Ohio St. 318 (1935) 3

State ex rel. The Steubenville Ice Co. v. Merrell, 127 Ohio St. 453 (1934) 4

The Bank of Toledo v. The City of Toledo and John R. Bond, 1 Ohio St. 622, 686 (1853) 2

The City of Cincinnati v. The Louisville & Nashville Railroad Company, 88 Ohio St. 283 (1913) 2

The Pontiac Improvement Co. v. The Board of Commissioners of The Cleveland Metropolitan Park District, 104 Ohio St. 447 (1922) 2

The State of Texas v. Waco Independent School District, 364 S.W. (2d) 263 (1963) 4

IN THE

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No. 393

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Respondent.

JURISDICTION

Certiorari should be denied for the following reasons:

1. No federal questions were raised by a pleading, by request to charge and exceptions or by assignment of error and no federal question was timely or properly raised in the Supreme Court of Ohio so as to give this Court jurisdiction to review the judgment on writ of certiorari.

2. The decision of the Supreme Court of Ohio was based on adequate and independent non-federal grounds.

QUESTION PRESENTED

When the State of Ohio duly appropriates property and property rights of the Board of Education of the City School District of the City of Cleveland for highway purposes, is the measure of compensation to be determined under the law of Ohio?

ARGUMENT IN OPPOSITION TO THE WRIT

The Board of Education of the City School District of the City of Cleveland is an agent of the state for the purpose of carrying on the affairs of the State of Ohio, and it may be characterized as a public school agent. *Finch v. Board of Education of Toledo,* 30 Ohio St. 37 (1876). It is an arm, agency or instrumentality of the State of Ohio for

the promotion of education throughout the state by the establishment of a statewide system of common schools. *Board of Education of Cincinnati v. Volk,* 72 Ohio St. 469 (1905). It is a corporation of a public nature charged with the performance of public duties; but it is not a municipal corporation, either in whole or in part, for the usual political and governmental functions of other subdivisions of the state. *Cline v. Martin,* 94 Ohio St. 420 (1916).

Thus it is not what is known as a "person" under the provisions of the Constitution. It is purely a creature of statute and has no power except that granted by the legislature. *Lincoln Township School District v. Redfield Consolidated School District,* 226 Iowa 298 (1939).

During the reviews of the judgment in the state courts, petitioner never raised a federal question. Its position in both the Court of Appeals of Cuyahoga County, Ohio (at page 17A of Answer Brief of the City of Cleveland, Appellee) and in the Supreme Court of Ohio (at page 17 of Brief of Cleveland Board of Education, Appellee) was that it was entitled to compensation under Section 19, Article I, Constitution of Ohio. This position both ignores the fundamental fact that this proceeding involves the appropriation of public property for a public purpose and fails to establish a denial of compensation therefor.

The State of Ohio exercised the sovereign power of eminent domain as delegated to the Director of Highways by the legislature. *The Bank of Toledo v. The City of Toledo and John R. Bond,* 1 Ohio St. 622, 686 (1853); *The City of Cincinnati v. The Louisville & Nashville Railroad Company,* 88 Ohio St. 283 (1913); *The Pontiac Improvement Co. v. The Board of Commissioners of The Cleveland Metropolitan Park District,* 104 Ohio St. 447 (1922). The delegation and scope of power is contained in Section 5519.01, Revised Code.

The statutory authority to appropriate public property is not subject to constitutional limitations applicable to private property under Section 19, Article I of Constitution of Ohio. Accordingly, the well established principles of law developed in the interpretation of this statute and its antecedents are applicable herein unless specifically qualified.

The law of Ohio, as set forth in the second paragraph of the syllabus of *Board of County Commissioners v. Thormyer, Acting Director of Highways,* 169 Ohio St. 291 (1959) supports the foregoing conclusion by an unqualified pronouncement of the law of Ohio as follows:

> "Since a land appropriation proceeding is essentially an appropriation of physical property and not merely the rights of persons, *the value of the property as a whole is to be determined first without regard to what may be the interests of ownership therein,* and although, after a determination of that amount, it must be apportioned among those having interests of ownership in the appropriated property, the determination of the extent of those interests of ownership is a matter of no concern to the appropriator of the property or the jury called upon to determine the amount of the award." (Emphasis added.)

The use—not the ownership—of the property is the significant factor in determining the measure of compensation for property and property rights appropriated from the petitioner. This principle is firmly established in the law of Ohio. *Sowers, Supt. v. Schaeffer,* 155 Ohio St. 454 (1951); *Board of County Commissioners v. Thormyer, Acting Director of Highways,* 169 Ohio St. 291 (1959).

Petitioner is to be treated in this proceeding in the same manner as a private litigant. *State ex rel. Board of Education of Springfield City School District v. Gibson,* 130 Ohio St. 318 (1935).

The authorities cited by petitioner do not support the proposition that any measure of compensation that denies

petitioner the cost of replacement facilities or substitution value of the property and property rights appropriated is a denial of just compensation, due process and equal protection of the laws in violation of the Fourteenth Amendment and Fifth Amendment to the Constitution of the United States. For example, the decision in *The State of Texas v. Waco Independent School District,* 364 S.W. (2d) 263 (1963), is based solely upon an interpretation of Article 6674 w-3 of the Revised Civil Statutes of Texas.

A review of the cases and the establishment of a measure of compensation in certain appropriation proceedings brought by the government of the United States under the Fifth Amendment to the Constitution of the United States would serve no useful purpose. At the same time, respondent recognizes that the Supreme Court of Ohio has stated that the intendment of Section 19, Article I, Constitution of Ohio and the Fifth Amendment of the Constitution of the United States is manifestly identical although the Fifth Amendment of the Constitution of the United States is a limitation upon the federal government. *State ex rel. The Steubenville Ice Co. v. Merrell,* 127 Ohio St. 453, at 454 (1934).

Petitioner sets forth the statutory provisions believed to confer on this Court jurisdiction to review the judgment by writ of certiorari at page three of its petition. Included without discussion are Section 5537.06 and Section 4931.08 of the Revised Code of Ohio. These statutes support the position of respondent since the legislature of Ohio has made substitute facilities or the cost of restoring certain facilities to their former state of usefulness a specific prerequisite in its delegation of the sovereign power of eminent domain where it deems necessary. The Ohio Turnpike Commission is required to provide substitute facilities under certain conditions set forth in Section 5537.06, Revised

Code. By this same token, Section 4931.08, Revised Code, limits compensation to municipal corporations in the appropriation by a telegraph company of easements over a street, alley or public way to that which is necessary to restore the pavement to its former state of usefulness. This provision does *not* apply to lands devoted to *other public uses.*

There is no such qualification of that sovereign power of eminent domain delegated to the Director of Highways by the legislature. There is no requirement that respondent furnish substitute facilities in either Title 55 of the Revised Code of Ohio, under which this action was commenced, or Title 1 of the Revised Code of Ohio—the alternative procedures available to respondent under the recently enacted uniform eminent domain act.

Section 5501.18, Revised Code, establishes the proper venue for actions brought against the respondent and is not applicable herein, and Section 3313.48, Revised Code, has not been discussed by petitioner.

Petitioner has had recourse to all applicable procedures set forth in cited Sections 5519.01, 5519.02 and 5519.03 of the Revised Code of Ohio, including the right to trial by jury and the right of appeal. It will receive compensation and damages based upon fair market value as the result of the appropriation of its property and property rights herein.

CONCLUSION

For this Court to entertain jurisdiction, it must appear that a federal question was presented for decision, that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment could not have been given without deciding it. *Lynch v. New York*, 293 U.S. 52 (1934).

The decisions of this Court clearly require petitioner to

demonstrate that the Supreme Court of Ohio prescribed a rule of law for the guidance of the jury that was in absolute disregard of its right to just compensation. *Chicago, Burlington & Quincy Railroad Company v. City of Chicago,* 166 U.S. 226 (1897); *James P. McGovern v. City of New York,* 229 U.S. 363 (1913); *McCoy v. Union Elevated Railroad Company,* 247 U.S. 354 (1918). Petitioner will receive the full and fair equivalent of the property and property rights appropriated; and it will receive just compensation as measured by market value. Assuming for the sake of argument that petitioner is a "person" under the due process clause of the Constitution of the United States, there is no federal question to be decided. *Chicago, Burlington & Quincy Railroad Company v. City of Chicago,* 166 U.S. 226 (1897); *McCoy v. Union Elevated Railroad Company,* 247 U.S. 354 (1918).

As the decision of the Supreme Court of Ohio is clearly consistent with the established principles of the Ohio law of eminent domain and is supported by adequate, substantial, and independent non-federal grounds, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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